

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35701

CHARLES A. ROGERS,)	2009 Unpublished Opinion No. 731
)	
Petitioner-Appellant,)	Filed: December 16, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Second Judicial District, State of Idaho, Clearwater County. Hon. John H. Bradbury, District Judge.

Order dismissing petition for post-conviction relief, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

PERRY, Judge Pro Tem

Charles A. Rogers appeals from the district court's order dismissing his petition for post-conviction relief following an evidentiary hearing. Rogers asserts that the district court erred in its determination that Rogers failed to prove that he had received ineffective assistance of trial counsel. We affirm.

Rogers was found guilty by a jury of two counts of delivery of methamphetamine following two controlled buys to a confidential informant later identified as Jeremy Tachell. The facts of Rogers' underlying criminal action are set forth in the Court of Appeals decision from his direct appeal as follows:

The first drug buy occurred on June 30, 2004. Wired with a listening device, the CI went to the home of Melissa Pitcher in Greer, Idaho and told her he would like to purchase methamphetamine from Rogers. Pitcher telephoned Rogers at his mother's trailer home, twelve miles away in Ahsahka, and left a message. Several minutes later, Rogers returned the call and agreed to come over after learning that the CI wanted some methamphetamine. Rogers picked up the CI and dropped him off at a store in Orofino, Idaho, located between Greer and Ahsahka. Police

officers following in unmarked vehicles stopped to talk with the CI and learned that Rogers had gone to get the methamphetamine. Five minutes later, Rogers returned and drove the CI to a nearby hotel. The CI handed the officers a substance that tested positive for methamphetamine. He informed them that Rogers was going to Lewiston to buy some more. The Idaho State Police proceeded to track Rogers to a house in Lewiston.

The second drug transaction occurred on July 3, 2004. The CI contacted Rogers by calling him at his mother's home to inquire about purchasing more drugs. Rogers said he "had product" at that time. Later, when the CI called again, Rogers had sold out of the product, but said that with \$100 from the CI he could acquire two "eight balls." The third time the CI telephoned, Rogers' mother answered and told Rogers that the CI had obtained \$100. Rogers made arrangements to meet the CI at the Orofino City Park, approximately four miles from the trailer home where Rogers resided with his mother. Undercover officers observed Rogers pick up the CI at the park, drive away, and then return within three to five minutes. During that time, the buy money was exchanged and Rogers said he would be back in two hours. While Rogers drove off toward Lewiston, Deputy Jared Mitchell obtained a warrant to search the trailer in Ahsahka.

Several hours later, Rogers came back to the Orofino City Park, picked up the CI, and drove to the Ahsahka trailer court. Rogers delivered methamphetamine to the CI at the trailer court's Laundromat. After dropping off the CI in Orofino, Rogers was arrested going home. No methamphetamine or marked buy money was found incident to the arrest. The search warrant was executed around 11:30 p.m. that evening, resulting in seizure of a few syringes, a tin containing residue and a pipe, a spoon with residue, a mirror and razor blade with white residue, a poem about dealing methamphetamine, and indicia of residence such as letters and photos.

State v. Rogers, Docket No. 31913 (Ct. App. July 17, 2007) (unpublished) (footnote omitted).

Notified before trial that the state intended to introduce the testimony of Eric Wilson concerning Rogers' previous alleged conduct, Rogers' filed a motion to exclude such testimony. Rogers' motion was granted in part and denied in part. Rogers also filed a motion to suppress the poem and paraphernalia found in his home asserting that the magistrate lacked probable cause to issue the warrant. This motion was denied. Rogers was convicted by a jury and sentenced to concurrent unified twenty-year sentences with eight years fixed.

On appeal Rogers claimed that the district court erred in denying in part his motion in limine to exclude Wilson's testimony. This Court concluded that the admitted evidence was "probative to show Rogers' preparation for the charged offenses by acquiring methamphetamine to sell," thereby affirming the district court's ruling. *Rogers*, Docket No. 31913, p. 8.

Rogers filed a timely *pro se* petition for post-conviction relief alleging trial counsel was ineffective for failing to “properly” object to the introduction of the poem and the paraphernalia found pursuant to the search warrant. Rogers also asserted that trial counsel was ineffective for failing to object to Wilson’s testimony which Rogers claimed had “changed” at trial. Finally, Rogers asserted a claim of ineffective assistance of appellant counsel; however he does not pursue that issue in this appeal. Rogers filed an affidavit in support of his petition and requested court appointed counsel. This request was granted. The state filed an answer to Rogers’ petition and the district court scheduled a hearing on the petition. Prior to the hearing Rogers filed a brief in support of his petition. Rogers did not testify and presented no further evidence at the hearing in addition to the previously filed affidavit. The district court denied Rogers’ petition. Rogers appealed.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney’s performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney’s representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney’s deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court’s factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the

inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

First we address Rogers' claim that trial counsel failed to properly object to the introduction of the poem and the paraphernalia found pursuant to the search of his residence. The district court denied relief on this claim concluding that both the poem and the paraphernalia were relevant to show Rogers' knowledge about and possession of methamphetamine and that the probative value of the evidence was not substantially outweighed by any unfair prejudice.

As an element of the offense, the state in the criminal case had to prove that Rogers knew or thought what he delivered was methamphetamine. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. Evidence of Rogers' knowledge and familiarity with methamphetamine was therefore relevant. *See State v. Williams*, 134 Idaho 590, 6 P.3d 840 (Ct. App. 2000). In addition, the district court in denying Rogers' petition concluded that the probative value of this evidence at trial was not substantially outweighed by unfair prejudice. We agree with the district court as to the paraphernalia, but not as to the poem. Any marginal relevance of the poem regarding Rogers' knowledge of methamphetamine was substantially outweighed by its unfair prejudicial effect. The poem references past and present methamphetamine use, addiction, manufacture, dealing, incarceration and drug culture among other things.¹ While the district court gave a limiting instruction, the court prefaced the instruction by telling the jury that the poem was "designed to associate him with that substance." The court's statement itself served to associate Rogers with the substance and, therefore, the limiting instruction was inadequate. However, given the other compelling evidence presented at trial, Rogers was not prejudiced by counsel's failure to object to the evidence on I.R.E 403 grounds. As this Court previously stated:

The state presented compelling evidence that on two occasions Rogers delivered methamphetamine to the CI during controlled buys. This evidence included the CI's testimony, drug paraphernalia found in Rogers' residence,

¹ To the extent Rogers also contends counsel was deficient for failing to object to the poem as improper 404(b) evidence, this claim was not alleged in Rogers' petition. Therefore we need not address it further.

Wilson's testimony that he witnessed the CI at Rogers' trailer park on July 3, holding the packet of methamphetamine that the CI allegedly had purchased from Rogers that day, and Wilson's testimony about a large purchase of methamphetamine arranged by Rogers the week prior to his deliveries charged in this case.

Rogers, Docket No. 31913 (Ct. App. July 17, 2007) (unpublished). Therefore, Rogers has failed to demonstrate deficient performance regarding the admission of the paraphernalia and has failed to demonstrate prejudice as to the poem. The district court's dismissal of these claims is affirmed.

In his petition Rogers also claimed that his trial counsel was ineffective for failing to object to a "change" in Wilson's testimony. Prior to trial the state notified Rogers that Wilson would testify to observing Rogers purchase methamphetamine from an individual in Clarkston, Washington. At trial Wilson testified that the methamphetamine was not handed directly to Rogers, but instead to another person who was present at the transaction. The district court denied relief on Rogers' claim concluding that the evidence was "benign compared to what had been expected" and that it was "almost incidental to the overall evidence in the case."

On appeal the state first asserts that Wilson's testimony, when read in context, did not change. We agree. Our review of the transcript of Rogers' trial shows that Wilson's testimony was not substantially different from that disclosed in the state's 404(b) notice. Wilson testified that Rogers was present at the previous transaction in Clarkston, Washington and that although the cash and drugs were handed to a third person, Rogers was the one "scoring" the drugs. The district court's conclusion that the evidence was "benign"--actually more favorable to Rogers than what had been anticipated--is supported by the record. In addition this Court concluded in Rogers' direct appeal that Wilson's testimony was admissible at Rogers' trial. Accordingly Rogers has failed to show that his trial counsel was deficient for failing to object to Wilson's "changed" testimony.

Because Rogers has not shown that his trial counsel was deficient he has not shown error in the district court's denial of his petition for post-conviction relief. The district court's order denying Rogers' petition is therefore affirmed.

Judge GRATTON and Judge MELANSON CONCUR.